

IN THE CIRCUIT COURT FOR THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY,
FLORIDA

JAMES M. KAMINSKI,

CASE NO.: 2014-CA-007794-O

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY & MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,

Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Ronald Barnes, Hearing Officer.

Tad A. Yates, Esquire,
for Petitioner.

Kimberly A. Gibbs, Senior Assistant General Counsel,
for Respondent.

BEFORE THORPE, EVANS, S. KEST, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, James M. Kaminski (Petitioner), seeks certiorari review of the Department of Highway Safety and Motor Vehicles' (Department) final order sustaining the suspension of his driver's license for refusing to submit to a blood-alcohol test. This Court has jurisdiction pursuant to section 322.2615(13), Florida Statutes and Florida Rule of Appellate Procedure 9.030(c)(3).

As stated in the arrest affidavit submitted at the hearing on June 24, 2014, this series of events took place on May 20, 2014 at 10:54 PM. Officer Maloney of the Apopka Police Department observed a vehicle being operated by Petitioner in a reckless and dangerous manner. He observed it traveling on the wrong side of the road on several occasions, at fluctuating speeds outside of the legal limits, weaving in and out of travel lanes, and forcing multiple vehicles to take action in order to avoid head-on collisions. Officer Maloney followed and paralleled the vehicle with his lights and siren activated but Petitioner refused to stop. He was then close enough to the vehicle to clearly see Petitioner. When Petitioner turned onto the railroad tracks, Officer Maloney was unable to follow and alerted dispatch in order to request assistance. Officer Campbell responded to the radio call, found the vehicle, and drove close enough to view Petitioner before losing him on the railroad tracks.

Other Apopka police officers then located the abandoned vehicle, which was still running, and found Petitioner standing on top of a six or eight-foot wall. Officers Maloney and Campbell arrived on scene and positively identified Petitioner as the driver of the vehicle. Petitioner stated, "I'm not coming down...", "Don't tase me," and "I'm on some bad narcotics." A search of the vehicle resulted in finding Petitioner's Tennessee driver's license and a syringe filled with a clear liquid.

Petitioner fell from the wall, did not comply with the officer's commands, and was restrained by the police officers. Officer Campbell made contact with Petitioner and observed the following signs of impairment: glassy and bloodshot eyes, dilated pupils, paranoid behavior, extreme mood swings, body tremors, cotton mouth, profuse sweating, droopy eyelids, track marks on his arm, a blank stare, incomplete verbal responses, and acting in a violent and combative manner. Petitioner did not answer Officer Campbell's questions and was unable to

form complete, coherent sentences.

As Petitioner was screaming that he was in pain, he was transported to Florida Hospital Apopka. While in the ambulance, Officer Campbell requested that Petitioner submit to a blood test. He was given an implied consent warning and seemed to give a non-verbal consent. However, when the paramedic attempted to draw his blood, Petitioner screamed “No blood” and the attempt stopped. Petitioner’s privilege to operate a motor vehicle was suspended at this time. Upon his arrival at the hospital, Petitioner continued to be combative with the hospital staff and law enforcement. As a result, he was restrained to the bed. He was later released and transported to the Apopka Police Station.

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed, whether there was a departure from the essential requirements of law, and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver’s license was suspended for refusal to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.

3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2014).

Lack of Affidavits

Petitioner argues that the hearing officer's decision was not supported by competent substantial evidence because the "narrative reports" admitted into evidence by the Department are not affidavits as required by statute. He claims that they did not include proper jurats and, therefore, were not sworn. He also claims that the narrative reports are not affidavits because they did not incorporate by reference the jurats included in the record.

A formal review hearing may be conducted upon a review of the reports of a law enforcement officer, including documents relating to the refusal to take a blood test. § 322.2615(11), Fla. Stat. The narrative reports and jurats substantially comply with the statutory requirements, and therefore are "affidavits" within the meaning of section 322.615(11), Florida Statutes. *See Department of Highway Safety and Motor Vehicles v. McGill*, 616 So. 2d 1212, 1213 (Fla. 5th DCA 1993) (where the respondent claimed that documents were not affidavits under the new rules, it was found that reports by law enforcement officers on the probable cause issue which were signed by the officer and included a notary's certificate that the document had been "sworn to and subscribed before me" were sufficient to suspend a driver's license).

The narrative reports in this case substantially comply with the statute and meet generally recognized criteria for affidavits, as they reference a properly signed, dated, and notarized jurat for each report that states "I, Officer Malony (or Campbell), the arresting law enforcement officer, swear and affirm that I have established probable cause to believe the DEFENDANT

listed did commit the offense as detailed on the attached charging affidavit.” The jurats also state that a supplement report is attached.¹ In addition, the narrative reports also reference the case number, narrative suffix, and officer’s name and date that match the jurats. Therefore, based on the record, there was competent substantial evidence to support the hearing officer’s decision that the narrative reports together with the jurats in evidence were proper affidavits.

Lack of Legal Authority to Request a Blood Test

Petitioner argues that the hearing officer’s decision is not supported by competent substantial evidence that Officer Campbell had the legal authority to request a blood test from him and therefore, a refusal cannot be used to sustain the suspension. He claims that the administration of a breath or urine test would not have been impractical or impossible, and therefore, a blood test was not permissible.

Any person who accepts the privilege of operating a motor vehicle has given their consent to submit to an approved blood test for the purpose of determining the presence of chemical or controlled substances if there is reasonable cause to believe the person was under the influence while driving or in control of a motor vehicle, the person appears for treatment at a hospital, clinic, medical facility or ambulance, and the administration of a breath or urine test is impractical or impossible. § 316.1932(1)(c), Fla. Stat.

The record reflects that Petitioner’s behavior, statements, and physical appearance caused the officers to believe that he was under the influence of a controlled substance, not alcohol. This is specifically due to Petitioner’s admission that he’s on bad narcotics, the syringe filled with a clear substance in his vehicle, and what appeared to be “track” marks on his arm which is

¹ The Court finds it insignificant that the attachment is a “narrative report” rather than “supplemental report” as argued by Petitioner.

indicative of the use of intravenous drugs. Petitioner argues that the officers should have requested a breath or urine test as doing so would not have been impractical or impossible. However, a breath test would not reveal the use of drugs as was suspected and a urine test was not practical due to Petitioner's combative behavior and need to be restrained. As Petitioner made statements he was on bad narcotics and was taken to the hospital by ambulance for treatment related to his intoxicated driving, it was reasonable to request a blood test as neither a breath test nor a urine test was possible or practical given Petitioner's combative behavior and admission he had taken narcotics.

Accordingly, there was competent substantial evidence to support the hearing officer's decision to sustain the license suspension.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 3rd day of December, 2014.

/S/

JANET C. THORPE
Presiding Circuit Judge

EVANS and S. KEST, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 4th day of December, 2014 to: **Tad A. Yates**, 734 Rugby Street, Orlando, Florida 32804; and **Kimberly A. Gibbs, Senior Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, P.O. Box 9, Ocoee, Florida 34761.

/S/

Judicial Assistant